Professional and Clerical Employees Division, Teamsters Union Local 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL–CIO *and* Pacific Hotel Development Venture d/b/a Holiday Inn of Palo Alto-Stanford. Case 32–CB–3360

April 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On August 15, 1990, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided for the following reasons to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We believe that the rule of *Luxuray of New York*,[1] permitting an employer to exclude known union adherents from its election campaign meetings, also applies to unions. Accordingly, we find that a union is under no statutory obligation to permit employee-opponents of the union to attend its organizing meetings and thus the union may lawfully bar known or suspected opponents from such meetings.

Here, the Union invited unit employees to a meeting to discuss the recent decision in a Board representation case and to determine what further actions the Union should take. Employees Bisagno and Matre, who had testified at the representation hearing, attempted to attend the meeting. According to the credited evidence, Union Representative Wall demanded that Bisagno and Matre leave the meeting. Wall called them ''liars'' and said the paper she was holding (a copy of the Board hearing officer's report) demonstrated that. She also told the employees they were the ''lowest scum on earth and did not deserve to be in the meeting hall with the good hard working people'' of the Hotel.

The action taken against Bisagno and Matre was expulsion from an organizing meeting which they had no statutory right to attend. The only other conduct at issue is the Union's public use of epithets which have been found commonplace in labor struggles. See, e.g., *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). We see no significant distinction between the Union's conduct here and the employers' exclusion of union supporters in the above-cited cases. Concededly, the Union decided that the employees were opponents by evaluating their testimony at a Board hearing. However, this fact does not establish that the Union acted in retaliation for their having testified. Rather, the Union acted because it reasonably believed that the employees were opponents of the Union. We conclude that the exclusion of the employees from an organizing meeting and the public use of epithets did not constitute restraint or coercion proscribed by Section 8(b)(1)(A) of the Act.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Jeffrey Henze, for the General Counsel.
Andrew H. Baker, Esq. (Beeson, Silbert, Tayer, Bodine & Livingston), of San Francisco, California, for the Respondent.
Brian T. Ashe and *Judy S. Coffin, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Oakland, California, on May 3, 1990, on a complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on February 22, 1990. The complaint is based on a charge filed by Pacific Hotel Development Venture d/b/a Holiday Inn of Palo Alto-Stanford (the Hotel) on January 11, 1990. It alleges that Professional and Clerical Employees Division, Teamsters Union Local 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL–CIO (Respondent Union) has committed certain violations of Section 8(b)(1)(A) of the National Labor Relations Act.

Issue

The issue presented by this case is whether Respondent Union restrained or coerced two employees of the Hotel by denying them the right to attend a union organizational meeting and by apparently subjecting them to public ridicule and opprobrium, including publicly calling them liars and/or company spies because of testimony they had given before the National Labor Relations Board in a hearing on objections to an election.

All parties were given full opportunity to present evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties have filed briefs and they have been carefully considered. Based on the entire record, including an assessment of the relative credibility of the witnesses, I make the following

[1] 185 NLRB 100 fn. 1 (1970). In that case, the employer required employees who were members of the union organizing committee or suspected of having union sympathies to work while employees attended general meetings conducted by the employer during working hours. The Board adopted the judge's finding that it was not unlawful to bar the employees from the meeting. See also *Mueller Brass Co*., 220 NLRB 1127, 1138–1139 (1979), and *Spartus Corp*., 195 NLRB 134, 141 (1972).

FINDINGS OF FACT

I. JURISDICTION

Respondent Union admits that the Charging Party is a California corporation operating a hotel in Palo Alto, California. It further admits that during the past 12 months, the Hotel's revenues exceeded $500,000 and that it purchased and received goods and/or services valued in excess of $5000 which originated outside California. Respondent Union further admits that the Hotel is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent Union also admits it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The conduct being scrutinized in this matter occurred at a union-conducted meeting which occurred shortly after an NLRB hearing officer issued his report on objections to a representation election.

The parties have stipulated that on July 26, 1988, Respondent Union filed an election petition in Case 32–RC–2772 seeking to represent certain employees at the Hotel. The election was actually held on October 7, 1988, and the two employees who are assertedly the victims of the unfair labor practice, Morine Bisagno and Marilyn Matre, two clerical employees, voted in the election without challenge. The Union won the election. Subsequently, the Employer filed timely objections to the results. Without detailing those objections, it suffices to note that one of the objections dealt with a contention that the Union took advantage of certain supposed ethnic divisions among the Hotel's employees and another asserted that one of the employee organizers was actually a supervisor within in the meaning of the Act. The Board ordered a hearing on those objections and on May 17, 1989, that hearing was held before NLRB Hearing Officer Clark Finkbiner. Bisagno and Matre were subpoenaed by the Hotel to testify on its behalf.

On July 19, 1989, Hearing Officer Finkbiner issued his report on objections in which he recommended that the Board overrule all the Hotel's objections. The hearing officer's report shows that he found the Hotel's evidence insufficient. The Hotel filed a request for review but on October 12, 1989, the Board adopted the hearing officer's recommendations and issued its Decision and Certification of Representative certifying Respondent Union as the exclusive bargaining representative in the unit.

It should be further noted that the Hotel has refused to bargain in order to challenge the certification. At the time of the instant hearing, that matter was pending before the Board on the General Counsel's motion for summary judgment.

B. *The July 26, 1989 Meeting*

As noted, on July 19, 1989, Hearing Officer Finkbiner issued his report. In order to discuss it, Respondent Union on July 20 sent a letter to many of the Hotel's employees to invite them to a meeting on July 26. Both Bisagno and Matre received a copy of that invitation.

They, together with other employees, arrived at the Carpenters Hall in Redwood City at approximately 6 p.m. that day. They testified that moments after they entered the rear of the meeting room and while they searched for a seat among the rows of chairs, Union Business Representative/Organizer Julie Wall confronted them. Wall was seated on a desk at the front of the room, approximately 20 feet away. Bisagno and Matre stood behind a row of chairs.

Matre said the confrontation began after she greeted Wall. Both Bisagno and Matre report, and Wall generally agrees, that Wall demanded they leave, saying they were not welcome at the meeting. Although the sequences are somewhat inconsistent, it appears fair to say that Wall told them several times to leave. When Bisagno asked why, Wall replied they were the ''lowest scum on earth and did not deserve to be in the meeting hall with the good hard working people'' of the Hotel. When Bisagno persisted in asking the reasons they were being asked to leave, Wall told them they were ''liars'' and the papers which she was holding (a copy of the hearing officer's report) demonstrated that. Both Matre and Bisagno say Wall also accused them of being ''perjurers.'' In addition, they say Wall called Matre a ''slut'' and a ''whore.'' Finally, they say Wall told them she would remove them bodily from the meeting room if they did not leave voluntarily. Eventually both did leave, but only after Wall left the desk and began to approach them.

Wall denies the latter three accusations saying she would not have called them perjurers because that phrase involves technical questions of law and she did not know whether they were perjurers. She denies calling Matre a ''slut'' and/or a ''whore''; and she denies saying she would remove them bodily if they did not leave. Wall says instead she told them that if they did not leave she would call the police. Wall is corroborated on all three points by Karen Kent, a Hotel employee who is a member of the union organizing committee. Kent was present during the entire confrontation.[1]

Bisagno and Matre assert that Wall told them they could not attend any more meetings. Wall denies using those words but does say that she told them that they were ''evil'' and that she ''did not want to see their evil ugly faces again.'' After the two left, Wall said she explained to the other individuals in attendance that she had thrown the two out because she believed they were ''company spies.''

Wall testified that she concluded the two were company spies after listening to their testimony given before Hearing Officer Finkbiner. She says her suspicions were earlier aroused at an April 26 meeting. As she recalled, it was the first meeting Matre attended and only the second Bisagno had attended.[2] At the April 26 meeting Wall had discussed with the employees the question of whether they should engage in a strike against the Hotel. During the discussion, Matre announced she did not think a strike was a good idea because she claimed to know that the Hotel had already hired

[1] Bisagno and Matre have suggested that Kent was not present during the confrontation. Their suggestion is rejected in the face of Kent's testimony to the contrary.

[2] Neither Bisagno nor Matre had signed union authorization cards before the election. Kent explained that prior to the election, as the organizing committee attempted to assess the probable outcome, Bisagno and Matre were considered to be ''unknowns,'' because they had not been to meetings, had not signed cards, nor had they expressed their views to employee organizers.

replacement employees. That annoyed Wall who accused Matre of being a ''company plant.'' After the meeting was over, Kent received a report from a housekeeping employee that the employee had seen a tape recorder in Bisagno's purse. Kent, who had not seen it, advised Wall of the report. At that point, Wall concluded that Bisagno and Matre at the very least were not friends of the employees.

Later, Wall listened to Matre and Bisagno give testimony at the May 17 hearing. At that hearing they testified about the frequency of their having attended preelection union organizing meetings, testimony which Wall is certain was false. She believes Bisagno had never attended a union meeting until approximately 2 weeks after the election and she knew Matre had never attended a union meeting until April 26. As noted, Kent corroborates that recollection. It is in part based on attendance records. Furthermore, Wall heard them testify that notice of union organizing meetings had been given to Hispanic employees but not to Anglos and suggest that one of the organizers was a supervisor. Wall regards that testimony to be untrue as well. Based on her assessment of their testimony, together with the incidents occurring at the April 26 meeting, Wall decided both Bisagno and Matre were company spies.[3]

Despite her conclusions, their names remained on the Union's mailing list and, Wall says, they were inadvertently mailed invitations to the July 26 meeting. Indeed, their names were not stricken from the mailing list until sometime after October 1989. Nonetheless, they were not invited to any further union meetings although four more meetings were held in August and November 1989.

IV. ANALYSIS AND CONCLUSIONS

The parties have focused their attention on two principal points. The first is the assertion that the conduct occurring in the meeting itself, i.e., the public expulsion, coupled with the insults and the threat of bodily removal, constitutes restraint and coercion within the meaning of Sections 7 and 8(b)(1)(A) of the Act. The other is whether Wall's accusation that they had lied to the NLRB hearing officer was a motive for her decision to expel them and whether that constitutes punishment for testifying before the Board, normally a violation of Section 8(b)(1)(A). The General Counsel and the Hotel both argue that the restraint and coercion is clear and the fact that Wall admits that Bisagno and Wall's testimony before the Board influenced her constitutes an admission that Wall desired to punish these witnesses for giving testimony adverse to the Respondent Union's interest. Respondent, on the other hand, asserts that it did nothing to affect these employees' jobs or pocketbooks and did not threaten them bodily harm. Therefore, it asserts, the requisite restraint and coercion is missing from the proof, for name calling and insults do not generally rise to the level required for a violation, at least in a labor context.

Respondent Union further argues that the Act does not prohibit either management or a union from barring an employee it knows or believes to be a spy for the other side from its own meetings, citing *Mueller Brass Co*., 220 NLRB 1127, 1138–1139 (1979). See also the cases cited at 1139 fn. 10, *Spartus Corp*., 195 NLRB 134, 141 (1972), and *Luxuray of New York*, 185 NLRB 100 fn. 1 (1970). In *Mueller*, the employer excluded known union adherents from its election campaign meetings which were held on worktime, forcing the known union adherents to continue to work while other employees participated in the meeting. The Board held the employer had no statutory obligation to accord union adherents the opportunity to speak. Although it has found no cases where a union has similarly barred an opponent, Respondent argues that the rule should be same for a union as it is for an employer.

I am in agreement with Respondent Union on this particular point. Nothing in the Act requires the farmer to invite the fox into the henhouse. Any party to an election-related proceeding clearly has the right to exclude those whose interests are deemed inimicable to the party holding the meeting. Indeed, this is little different from a union choosing to solicit authorization cards from employees it thinks will support it although declining to solicit cards from those whom it thinks will report the activity to the employer. No one has ever suggested that common practice to be improper.

Even so, I think all parties have missed a major point. The General Counsel and the Hotel assert that Respondent Union expelled Matre and Bisagno from the meeting because of the testimony they gave at the hearing. That expulsion, they say, is punishment for having testified before the Board. I do not agree. Although a great deal of legal research has been performed by all counsel, no party has cited the case in which the Board decided the same issue. *Carpenters (Hughes Helicopters)*, 224 NLRB 350 (1976). In that case the incumbent union learned from testimony given in an NLRB hearing that three of its members had been organizing on behalf of a rival union. The incumbent's constitution prohibited that conduct, dual unionism, and it filed internal union charges against the employees. They were subsequently expelled from membership.

Administrative Law Judge Jerrold H. Shapiro, affirmed by the full Board, rejected the General Counsel's contention that the conduct amounted to a per se violation of the Act. He said at 355,

> I have found no case, and none has been cited for this novel proposition which holds in effect that neither an employer nor a union can use evidence of employee misconduct to punish the employee if the evidence of the misconduct was uncovered during the course of a Board proceeding through the employee's testimony. In other words, if an employer or a union discover for the first time during a Board hearing through the testimony of an employee that this employee is guilty of serious misconduct (i.e., stealing or destroying property) which ordinarily would result in discipline, the employer or union is nevertheless precluded from disciplining the employee. The Act in my view does not call for such an absurd result.

If one approaches the problem from the Board's authority to issue remedies, Judge Shapiro's logic becomes starkly clear. Section 10(c) of the Act states in pertinent part: ''No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or dis-

[3] During their testimony before me, Matre and Bisagno both said they told their supervisors what had transpired at the Union's postelection meetings. One could reasonably infer from that evidence that their conduct was consistent with that which could be expected of a spy, even if their conversations were in fact innocent.

charged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.'' Thus, even though Section 8(a)(4) and Section 8(b)(1)(A) of the Act prohibit employers and unions from punishing employees for giving testimony to the Board, the Act does not permit the Board to issue a remedy against a party for disciplining an individual who has committed an act of misconduct even if that misconduct is discovered through a Board proceeding. I think, however, there is a cautionary caveat which must be understood in connection with that rule and *Hughes Helicopters* does discuss it. If the asserted misconduct is only a pretext for the punishment, then the Board may issue an appropriate remedy so long as the discipline is for protected conduct. Pretext is not an issue we need be concerned about here.

I think, therefore, in analyzing this kind of case, one must be aware of these questions: Is the employee being punished for testifying against the party levying the discipline, or is the witness being punished because the testimony he gave adduced facts constituting misconduct which would result in the discipline no matter from what source the disciplining party learned of it? That is the lesson of Hughes Helicopters and that is the analysis which I shall apply here.

The General Counsel's facts here are a near copy of those presented in *Hughes Helicopters*, although in at least one respect they are weaker. In *Hughes* the union disciplined its own members for breaching its constitution. The proviso to Section 8(b)(1)(A)[4] permits a labor union to expel members for breach of its membership rules. Here neither Bisagno nor Matre was a member. They had no absolute right to attend these organizing meetings. They were simply guests who were subject to being disinvited if their views were deemed in discord with the meeting's purpose. If a union is permitted, as in *Hughes Helicopters*, to expel a member, who has certain rights to attend meetings, for breaching a membership rule discovered through a Board proceeding, a union is certainly permitted to disinvite a nonmember guest to a meeting because it mistrusts him or her.

The only doubt which can be placed on that analysis is whether the motive utilized by the Union in this case can violate the Act. Is there any prohibition in the Act which forbids a union from making such a decision? I do not think so. Thus, even if a union concludes that a nonmember witness told lies on the witness stand in an NLRB proceeding, it is free to ''penalize'' that individual in any way it chooses, so long as that conduct does not amount to restraint or coercion within the meaning of Section 8(b)(1). I well understand the Board's need to protect its witnesses and to concern itself with preventing evidence sources from drying up due to the intimidation of witnesses. See *NLRB v. Scrivener*, 405 U.S. 117 (1972). And, I well understand that neither a union nor an employer is the judge of those witnesses, nor should they be allowed to so consider themselves. Even so, expelling a person from a meeting which they have no right to attend in the first place cannot rise to the level of restraint or coercion no matter what the motive. I am aware that Section 8(a)(4) and its counterpart portion of Section 8(b)(1)(A) are to be read expansively. See *Scrivener* and *Pederson v. NLRB*, 234 F.2d 417, 420 (2d Cir. 1956) (extending the protection of Act to supervisors who give testimony to the Board). In each of those cases, however, an employment right was invaded. In other cases where violations have been found, there has been some sort of monetary penalty, i.e., a union fine. Nothing of either sort has occurred here.

In any event, it is clear to me that *Hughes Helicopters* controls the expulsion issue. Here Wall concluded, based on her assessment of the two witnesses' testimony before the NLRB that they were company spies. From any self-respecting union's point of view, during an organizing drive, that is misconduct of the worst sort. Therefore, almost any sanction, short of physical violence or property damage, or threats thereof, would be privileged by the Act. That would include holding the purported spies up to public ridicule or opprobrium. A union is privileged to confront its challengers, whether they be real or only perceived. This is part of the debate over unionization and is protected by Section 8(c) of the Act, the free speech section.[5] Moreover, *Hughes Helicopters* permits that sanction to be levied even if the union's reasons for those conclusions come from testimony before the Board. This is quite distinct from punishing a witness who gives testimony inimicable to the union's interest.

I do not think it is absolutely necessary to find that Wall's conclusions were reasonable based on the facts she knew, but in fact they were. Frankly, I think the expulsion of nonmembers deemed to be opponents of a union's organizing aims is privileged even if the union's beliefs are unreasonable, yet grounded in an analysis of testimony before the Board. The sole risk the union takes in that circumstance is whether its treatment of such individuals will antagonize other employees to the extent that they might vote against the union or unravel solidarity so as to affect its ability to carry out economic sanctions against the employer.

The only conduct which even approaches restraint or coercion is the alleged name calling and Wall's ''threat'' to bodily remove Bisagno and Matre from the meeting. Insofar as the latter is concerned, I find that there is very little evidence to support Bisagno and Matre's assertion. They admit that Wall, when leaving the desk to approach them, never came near enough to actually effect bodily removal. Moreover, even if Wall had ''bodily'' removed them, there is no suggestion that she would have caused them any injury. Most likely Wall would have escorted them out rather than exercised any harmful force. Furthermore, Wall's testimony, corroborated by Kent, that she would call the police to bring about their removal is credible. I am unwilling, on this evidence to conclude that Wall made a threat amounting to restraint or coercion.

Finally, with respect to the allegation that Wall publicly called Matre a ''slut'' and/or a ''whore,'' again the evidence is unimpressive. Matre says Wall used a ''low voice'' when she supposedly uttered those words. Bisagno's corroboration is quite weak for she was unable to recite the facts until her recollection was refreshed by counsel for the Hotel. No other person appears to have heard the insult, even if it was delivered. A sotto voce insult, even if defamatory, does not amount to public ridicule. Even if it did, in a labor context,

[4] ''[T]his paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.''

[5] Sec. 8(c) reads as follows: ''The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . if such expression contains no threat of reprisal or force or promise of benefit.''

I would not find it to be restraint or coercion within the meaning of Section 8(b)(1)(A). More likely it, too, would be privileged by the free speech provision of Section 8(c).[6]

Frankly, I am inclined to find that the evidence of Matre and Bisagno on the point is insufficient to establish that Wall actually uttered such words. Bisagno was hesitant to describe them and Matre wanted to downplay them. Wall's denial, corroborated by Kent, is far more credible.

CONCLUSIONS OF LAW

1. The Hotel is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the conduct described in this decision, Respondent did not violate Section 8(b)(1)(A) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed in its entirety.

[6] Under *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966), such insults are not regarded as defamatory unless motivated by actual malice. Assuming that malice is necessary to elevate the insult to a violation of Sec. 8(b)(1)A), evidence on the issue is nonexistent.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.